

**United States Bankruptcy Court
Central District of California
Riverside
Judge Mark Houle, Presiding
Courtroom 303 Calendar**

Wednesday, May 5, 2021

Hearing Room 303

10:00 AM

6:21-10314 Zulma Lopez

Chapter 7

#1.00 Pro se Reaffirmation Agreement Between Debtor and Ford Motor Credit Company LLC re 2019 Ford Fusion, in the amount of \$11,121.30

EH__

Docket 13

Tentative Ruling:

- NONE LISTED -

| |
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| Party Information |
|--------------------------|

Debtor(s):

Zulma Lopez

Represented By
Richard Mark Garber

Trustee(s):

Lynda T. Bui (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Riverside
Judge Mark Houle, Presiding
Courtroom 303 Calendar**

Wednesday, May 5, 2021

Hearing Room 303

10:00 AM

6:21-10421 Angelina Vasquez

Chapter 7

#2.00 Pro se Reaffirmation Agreement Between Debtor and OneMain Financial Group, LLC, in the amount of \$3116.50 re 2001 Mitsubishi Montero

EH__

Docket 16

Tentative Ruling:

- NONE LISTED -

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| Party Information |
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Debtor(s):

Angelina Vasquez

Represented By
Gary S Saunders

Trustee(s):

Karl T Anderson (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Riverside
Judge Mark Houle, Presiding
Courtroom 303 Calendar**

Wednesday, May 5, 2021

Hearing Room 303

10:00 AM

6:21-10592 Gabriel Zepahua Mendoza

Chapter 7

#3.00 Pro se Reaffirmation Agreement Between Debtor and Partners Federal Credit Union, in the amount of \$21,718.47, rep 2019 Honda Accord

EH__

Docket 11

Tentative Ruling:

- NONE LISTED -

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| Party Information |
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Debtor(s):

Gabriel Zepahua Mendoza

Represented By
Judy P Hsu

Trustee(s):

Arturo Cisneros (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Riverside
Judge Mark Houle, Presiding
Courtroom 303 Calendar**

Wednesday, May 5, 2021

Hearing Room 303

10:00 AM

6:21-10658 Heriberto Hernandez Cuevas

Chapter 7

#4.00 Pro se Reaffirmation Agreement Between Debtor and Flagship Credit
Acceptance, in the amount of \$13,925.21, re: 2016 Hyundai Sonata

EH__

Docket 11

Tentative Ruling:

- NONE LISTED -

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| Party Information |
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Debtor(s):

Heriberto Hernandez Cuevas

Represented By
Irma C Coler

Trustee(s):

Steven M Speier (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Riverside
Judge Mark Houle, Presiding
Courtroom 303 Calendar**

Wednesday, May 5, 2021

Hearing Room 303

10:00 AM

6:21-10681 Sandra G Garcia

Chapter 7

#5.00 Pro se Reaffirmation Agreement Between Debtor and OneMain Financial Group, LLC, in the amount of \$2,900.54 re: 2003 Chevy

EH__

Docket 10

Tentative Ruling:

- NONE LISTED -

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| Party Information |
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Debtor(s):

Sandra G Garcia

Represented By
Daniel King

Trustee(s):

Larry D Simons (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Riverside
Judge Mark Houle, Presiding
Courtroom 303 Calendar**

Wednesday, May 5, 2021

Hearing Room 303

10:00 AM

6:21-11898 Kathryn Jean Gomez

Chapter 7

#6.00 Pro se Reaffirmation Agreement Between Debtor and Toyota Financial

(Vehicle description, annual percentage rate, and amount financed not detailed in Reaffirmation Agreement)

EH__

Docket 6

Tentative Ruling:

- NONE LISTED -

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| Party Information |
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Debtor(s):

Kathryn Jean Gomez

Pro Se

Trustee(s):

Karl T Anderson (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Riverside
Judge Mark Houle, Presiding
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Wednesday, May 5, 2021

Hearing Room 303

11:00 AM

6:18-11895 Rosendo Adaiberto Lobos

Chapter 7

#7.00 Motion of Chapter 7 Trustee for an Order to Abandon the Estate's Assets to the Debtor and file a No Asset Report

EH__

(Tele. appr. Arturo Cisneros, chapter 7 trustee)

Docket 28

Tentative Ruling:

5/5/2021

Service proper
No opposition

TENTATIVE RULING

On April 14, 2021 Trustee filed the instant motion seeking an order to abandon the estate's assets in case 6:18-11895 filed by Debtor Rosendo Adaiberto Lobos on March 9, 2018. 11 U.S.C. § 554(a) states:

After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

As set forth in the motion, there being no unsecured claims to disburse the \$7,706.76 funds Trustee holds, the funds are of inconsequential value to the estate. As such, the Court is inclined to GRANT the motion, ordering the funds to be abandoned to Debtor less any payment of bond and bank fees.

APPEARANCES WAIVED. Movant to lodge order within seven days. If oral or written opposition is presented at the hearing, the hearing may be continued.

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| Party Information |
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**United States Bankruptcy Court
Central District of California
Riverside
Judge Mark Houle, Presiding
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Wednesday, May 5, 2021

Hearing Room 303

11:00 AM

CONT... Rosendo Adaiberto Lobos

Chapter 7

Debtor(s):

Rosendo Adaiberto Lobos

Represented By
Neil R Hedtke

Trustee(s):

Arturo Cisneros (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Riverside
Judge Mark Houle, Presiding
Courtroom 303 Calendar**

Wednesday, May 5, 2021

Hearing Room 303

11:00 AM

6:20-11274 Nelly Guadalupe Seneff

Chapter 7

#8.00 CONT. Notice of Trustee's Final Report and Applications for Compensation

From: 3/3/21

EH__

(Tele. appr. Matthew Kennedy, rep. chapter 7 trustee)

Docket 40

Tentative Ruling:

5/5/2021

No opposition has been filed.
Service was proper.

The applications for compensation of the Trustee and Attorney have been set for hearing on the notice required by LBR 2016-1. At the initial hearing on March 3, 2021, the Court was inclined to disallow attorney fees and reduce Trustee's compensation, noting Trustee, without Court approval, had entered into a compromise to sell the estate's interest in Debtor's residence. Having now approved that compromise retroactively by order entered on April 1, 2021, and pursuant to the Trustee's Final Report and the applications of the associated professionals, the Court is inclined to APPROVE the following administrative expenses:

Trustee Fees: \$ 2,150
Trustee Expenses: \$ 92.36

Attorney Fees: \$ 6,203.51
Attorney Expenses: \$ 207.15

APPEARANCES WAIVED. If written or oral opposition is presented at the hearing, the hearing may be continued. Trustee to lodge order within 7 days.

**United States Bankruptcy Court
Central District of California
Riverside
Judge Mark Houle, Presiding
Courtroom 303 Calendar**

Wednesday, May 5, 2021

Hearing Room 303

11:00 AM

CONT... Nelly Guadalupe Seneff

Chapter 7

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| Party Information |
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Debtor(s):

Nelly Guadalupe Seneff

Represented By
Todd L Turoci

Trustee(s):

Karl T Anderson (TR)

Represented By
Robert A Hessling

**United States Bankruptcy Court
Central District of California
Riverside
Judge Mark Houle, Presiding
Courtroom 303 Calendar**

Wednesday, May 5, 2021

Hearing Room 303

11:00 AM

6:20-12261 Jose Jimenez

Chapter 7

#9.00 Notice of Trustee's Final Report and Applications for Compensation

EH__

Docket 35

Tentative Ruling:

5/5/2021

No opposition has been filed.
Service was proper.

The application for compensation of the Trustee has been set for hearing on the notice required by LBR 2016-1. Pursuant to the Trustee's Final Report, the Court is inclined to APPROVE the following administrative expenses:

Trustee Fees: \$ 550
Trustee Expenses: \$ 0

APPEARANCES WAIVED. If written or oral opposition is presented at the hearing, the hearing may be continued. Trustee to lodge order within 7 days.

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| Party Information |
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Debtor(s):

Jose Jimenez

Represented By
Tristan L Brown

Trustee(s):

Howard B Grobstein (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Riverside
Judge Mark Houle, Presiding
Courtroom 303 Calendar**

Wednesday, May 5, 2021

Hearing Room 303

11:00 AM

6:20-15054 Luis Alberto Pineda-Mata

Chapter 7

#10.00 Notice of Objection and Motion to Extend Time to File Additional Evidence in Support of Objection to Debtor's Claimed Homestead Exemption, with Proof of Service

EH__

(Tele. appr. Tinho Mang, rep. chapter 7 trustee)

Docket 30

Tentative Ruling:

- NONE LISTED -

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| Party Information |
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Debtor(s):

Luis Alberto Pineda-Mata

Represented By
Todd L Turoci

Trustee(s):

Charles W Daff (TR)

Represented By
Chad V Haes
Tinho Mang
D Edward Hays

**United States Bankruptcy Court
Central District of California
Riverside
Judge Mark Houle, Presiding
Courtroom 303 Calendar**

Wednesday, May 5, 2021

Hearing Room 303

2:00 PM

6:17-17749 Joshua Cord Richardson

Chapter 7

Adv#: 6:19-01114 Sonnenfeld v. Diaz et al

#11.00 CONT. Status Conference RE: [1] Adversary case 6:19-ap-01114. Complaint by Cleo Sonnenfeld against Gabriela Nieto Diaz, Laguna Motors, Inc.. Recovery, and Preservation of Preferential Transfer; (2) Avoidance, Recovery, and Preservation of Constructive Fraudulent Transfer; and (3) Avoidance, Recovery, and Preservation of Actual Fraudulent Transfer [11 U.S.C. Sections 544, 547, 548, 550 and 551; Cal. Civ. Code Sections 3439.04, 3439.05] (Attachments: # 1 Adversary Proceeding Cover Sheet) Nature of Suit: (14 (Recovery of money/property - other)), (12 (Recovery of money/property - 547 preference)), (13 (Recovery of money/property - 548 fraudulent transfer)) (Hays, D)

From: 10/28/20,3/31/21

EH ____

Docket 1

***** VACATED *** REASON: CONTINUED TO 6/23/21 BY ORDER
ENTERED 2/17/21**

Tentative Ruling:

- NONE LISTED -

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| Party Information |
|--------------------------|

Debtor(s):

Joshua Cord Richardson

Represented By
Amid Bahadori

Defendant(s):

Gabriela Nieto Diaz

Pro Se

Laguna Motors, Inc.

Represented By
Julian K Bach

Plaintiff(s):

Cleo Sonnenfeld

Represented By

**United States Bankruptcy Court
Central District of California
Riverside
Judge Mark Houle, Presiding
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Wednesday, May 5, 2021

Hearing Room 303

2:00 PM

CONT... Joshua Cord Richardson

Chapter 7

Laila Masud
D Edward Hays

Trustee(s):

Todd A. Frealy (TR)

Represented By
Anthony A Friedman

**United States Bankruptcy Court
Central District of California
Riverside
Judge Mark Houle, Presiding
Courtroom 303 Calendar**

Wednesday, May 5, 2021

Hearing Room 303

2:00 PM

6:17-18617 Christy Carmen Hammond

Chapter 7

**#12.00 CONT Motion to Disallow Homestead Exemption
HOLDING DATE**

Also #13

From: 12/18/19, 5/20/20, 9/9/20, 11/4/20, 12/2/20, 1/6/21, 2/3/21

EH__

Docket 49

***** VACATED *** REASON: CONTINUED TO 6/30/21 BY ORDER
ENTERED 4/28/21**

Tentative Ruling:

- NONE LISTED -

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| Party Information |
|--------------------------|

Debtor(s):

Christy Carmen Hammond

Represented By
Eric C Morris

Movant(s):

Robert Whitmore (TR)

Represented By
Douglas A Plazak

Trustee(s):

Robert Whitmore (TR)

Represented By
Douglas A Plazak

**United States Bankruptcy Court
Central District of California
Riverside
Judge Mark Houle, Presiding
Courtroom 303 Calendar**

Wednesday, May 5, 2021

Hearing Room 303

2:00 PM

6:17-18617 Christy Carmen Hammond

Chapter 7

#13.00 CONT Motion for Order Compelling Debtor to Vacate and Turnover Real Property
HOLDING DATE

Also #12

From: 11/13/19, 12/18/19, 5/20/20, 9/9/20, 11/4/20, 2/2/20, 1/6/21, 2/3/21

EH ____

(Tele. appr. Douglas Plazak, rep. Plaintiff, Robert Whitmore)

Docket 40

***** VACATED *** REASON: CONTINUED TO 6/30/21 BY ORDER
ENTERED 4/28/21**

Tentative Ruling:

- NONE LISTED -

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|--------------------------|
| Party Information |
|--------------------------|

Debtor(s):

Christy Carmen Hammond

Represented By
Eric C Morris

Movant(s):

Robert Whitmore (TR)

Represented By
Douglas A Plazak

Trustee(s):

Robert Whitmore (TR)

Represented By
Douglas A Plazak

**United States Bankruptcy Court
Central District of California
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Courtroom 303 Calendar**

Wednesday, May 5, 2021

Hearing Room 303

2:00 PM

6:17-18617 Christy Carmen Hammond

Chapter 7

Adv#: 6:19-01144 Whitmore v. Hammond

#14.00 CONT Status Conference RE: [1] Adversary case 6:19-ap-01144. Complaint by Robert S. Whitmore against Kenneth Hammond. (Charge To Estate) \$350.00 (Attachments: # 1 Adversary Proceeding Cover Sheet # 2 Unexecuted Summons) Nature of Suit: (11 (Recovery of money/property - 542 turnover of property)),(31 (Approval of sale of property of estate and of a co-owner - 363(h))), (91 (Declaratory judgment))

HOLDING DATE

From: 12/18/19, 5/20/20, 9/9/20, 11/4/20, 12/2/20,1/6/21,2/3/21

EH ____

Docket 1

***** VACATED *** REASON: CONTINUED TO 6/30/21 BY ORDER
ENTERED 4/26/21**

Tentative Ruling:

- NONE LISTED -

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| Party Information |
|--------------------------|

Debtor(s):

Christy Carmen Hammond

Represented By
Eric C Morris

Defendant(s):

Kenneth Hammond

Pro Se

Plaintiff(s):

Robert S. Whitmore

Represented By
Douglas A Plazak

Trustee(s):

Robert Whitmore (TR)

Represented By
Douglas A Plazak

**United States Bankruptcy Court
Central District of California
Riverside
Judge Mark Houle, Presiding
Courtroom 303 Calendar**

Wednesday, May 5, 2021

Hearing Room 303

2:00 PM

6:19-19387 Corinne Lara Ramirez

Chapter 7

Adv#: 6:20-01006 Eggleston et al v. Ramirez

#15.00 CONT Status Conference RE: [1] Adversary case 6:20-ap-01006. Complaint by David Eggleston, Karin Doerr, Richard Alvarado, Yan Sum Alvarado against Corinne Lara Ramirez. (d),(e)),(62 (Dischargeability - 523(a)(2), false pretenses, false representation, actual fraud)),(68 (Dischargeability - 523(a)(6), willful and malicious injury))

Also #16

From 10/7/20, 10/14/20,11/18/20,2/3/21

EH__

(Tele. appr. Scott Talkov, rep. Defendant, Connie Ramirez)

Docket 1

Tentative Ruling:

- NONE LISTED -

| |
|--------------------------|
| Party Information |
|--------------------------|

Debtor(s):

Corinne Lara Ramirez

Represented By
Natalie A Alvarado

Defendant(s):

Corinne Lara Ramirez

Represented By
Scott Talkov

Plaintiff(s):

David Eggleston

Represented By
Tyler H Brown

Karin Doerr

Represented By
Tyler H Brown

**United States Bankruptcy Court
Central District of California
Riverside
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Wednesday, May 5, 2021

Hearing Room 303

2:00 PM

CONT... Corinne Lara Ramirez

Chapter 7

Richard Alvarado

Represented By
Tyler H Brown

Yan Sum Alvarado

Represented By
Tyler H Brown

Trustee(s):

Steven M Speier (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Riverside
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Courtroom 303 Calendar**

Wednesday, May 5, 2021

Hearing Room 303

2:00 PM

6:19-19387 Corinne Lara Ramirez

Chapter 7

Adv#: 6:20-01006 Eggleston et al v. Ramirez

#16.00 Defendants' Motion to Dismiss Second Amended Complaint for Failure to State a Claim; Points and Authorities; Request for Judicial Notice

Also #15

EH__

(Tele. appr. Scott Talkov, rep. Defendant, Connie Ramirez)

Docket 82

Tentative Ruling:

5/5/2021

Service proper
Opposition filed

BACKGROUND

On October 24, 2019, Corinne Lara Ramirez ("Defendant") filed a Chapter 7 voluntary petition. On October 5, 2020 the order of discharge was entered closing the bankruptcy case on October 6, 2020.

While the bankruptcy was still proceeding, on January 22, 2020, David Eggleston, Karin Doerr, Richard Alvarado, and Yan Sum Alvarado ("Plaintiffs") filed a non-dischargeability complaint ("Complaint") against Defendant pursuant to 11 U.S.C. § 523(a)(2)(A) and (a)(6). On October 2, 2020, Plaintiffs filed a motion for leave to amend. The hearing was held on November 18, 2020, in which the Court orally granted the Plaintiff's request.

On December 1, 2020, Plaintiffs filed the first amended complaint ("FAC"). On December 3, 2020, the Court entered an order granting Defendant's first motion to dismiss as to the § 523(a)(6) second cause of action and denying Defendant's motion

**United States Bankruptcy Court
Central District of California
Riverside
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Wednesday, May 5, 2021

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2:00 PM

CONT... Corinne Lara Ramirez

Chapter 7

as to the § 523(a)(2)(A) first cause of action, granting Plaintiffs leave to amend the first cause of action.

On December 23, 2020, Defendant filed a second motion to dismiss arguing the allegations in the FAC do not meet the heightened pleading requirement of FED. R. CIV. P. Rule 9(b). The Court granted Defendant's motion with leave to amend pursuant to order entered on February 10, 2021.

On February 19, 2021, Plaintiff's filed the second amended complaint ("SAC"). On March 22, 2021, Defendant filed the instant and third motion to dismiss for failure to state a claim. Plaintiffs opposed on April 1, 2021. On April 28, 2021, Defendant filed a reply.

DISCUSSION

I. MOTION TO DISMISS STANDARD

FED. R. CIV. P. Rule 12(b)(6), made applicable in adversary proceedings through FED. R. BANKR. P. Rule 7012, a bankruptcy court may dismiss a complaint if it fails to "state a claim upon which relief can be granted." In reviewing a FED. R. CIV. P. Rule 12(b)(6) motion, the trial court must accept as true all facts alleged in the complaint and draw all reasonable inferences in favor of the plaintiff. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). The trial court need not, however, accept as true conclusory allegations in a complaint or legal characterizations cast in the form of factual allegations. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007); *Hartman v. Gilead Scis., Inc. (In re Gilead Scis. Sec. Litig.)*, 536 F.3d 1049, 1055 (9th Cir. 2008).

To avoid dismissal under FED. R. CIV. P. Rule 12(b)(6), a plaintiff must aver in the complaint "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). It is axiomatic that a claim cannot be plausible when it has no legal basis. A dismissal under FED. R. CIV. P. Rule 12(b)(6) may be based either on the lack of a cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1121 (9th Cir.2008).

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CONT...

Corinne Lara Ramirez

Chapter 7

II. *NON-DISCHARGEABILITY STANDARD*

- (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –
 - (2) for money, property, services, or an extension, renewal, or refinancing of creditor, to the extent obtained by –
 - (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

The elements of a § 523(a)(2)(A) claim are well-established: (a) the debtor made representations; (b) which were known to be false; (c) the representations were made with the intention and purpose of deceiving the creditor; (d) the creditor relied on such representations; (e) the creditor sustained loss and damage as a proximate result of the representations. *See, e.g., In re Sabban*, 600 F.3d 1219, 1222 (9th Cir. 2010).

III. *RULE 9(B) STANDARD*

FED. R. CIV. P. Rule 9(b) is applicable to a § 523(a)(2)(A) non-dischargeability proceeding. *See, e.g., In re Kimmel*, 2008 WL 5076380 at *1 (9th Cir. 2008). FED. R. CIV. P. Rule 9(b) states: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."

"In order to properly plead fraud with particularity, the complaint must allege the time, and content of the fraudulent representation such that a defendant can prepare an adequate response to the allegations." *In re Kimmel*, 2008 WL 5076380 at *1. The heightened pleading standard is commonly cited as requiring the allegations to identify "the who, what, when, where, and how of the misconduct charged." *See, e.g. U.S. v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1167 (9th Cir. 2016); *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003).

IV. *ANALYSIS*

The SAC lists two sets of representations. As to the Alvarado Plaintiffs, the only

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CONT...

Corinne Lara Ramirez

Chapter 7

alleged false representation made by Defendant that the Court can discern as remotely sufficient is as to the value of the wine, which representation was allegedly made by George Walker in the presence of Defendant (and so Defendant is apparently liable under some theory not elaborated on by Plaintiff that George Walker's representation was, the Court assumes, somehow adopted by and deemed made also by Defendant through her silence). Aside from the vagueness of that theory and the allegations, however, there is no allegation that Defendant had any knowledge of the value of the wine or that it was vinegar. Moreover, there is no allegation that any such "representation" by Defendant was made with intent to deceive, nor is there any allegation that Plaintiffs relied on that representation or that such representation was reasonable. Thus, and for reasons otherwise set forth in the Defendant's moving papers, Plaintiff has failed to state a claim with respect to the Alvarado Plaintiffs.

As to the Eggleston and Doerr Plaintiffs, the Court finds that the only somewhat meritorious representation is the following: "Defendant Corinne Lara Ramirez stated that she knew how to operate a wine business and had a complete knowledge of the financial and operating aspects of the wine making industry." [SAC ¶ 6]. While the statement lacks detail to support her alleged knowledge, the Court disagrees with Defendant that this is mere "puffing" given that the representation related to Defendant's knowledge and experience specifically in the wine making industry—it was a statement that she had knowledge, not the degree of her knowledge. Moreover, as it was a statement about her own abilities and knowledge, the statement necessarily assumes Defendant's knowledge of the falsity. However, there is no allegation that the representation was made with the intent to deceive, with allegation of supporting facts, nor is there any allegation that reliance on Defendant's statement was reasonable, also with allegation of supporting facts. Thus, and for reasons otherwise set forth in the Defendant's moving papers, Plaintiff has failed to state a claim with respect to the Eggleston and Doerr Plaintiffs.

TENTATIVE RULING

Given the existence of such material deficiencies notwithstanding having already amended the Complaint twice, and the apparent futility of further amendment, it is the Court's intention to GRANT the motion to dismiss WITHOUT leave to amend.

APPEARANCES REQUIRED.

**United States Bankruptcy Court
Central District of California
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Wednesday, May 5, 2021

Hearing Room 303

2:00 PM

CONT... Corinne Lara Ramirez

Chapter 7

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|--------------------------|
| Party Information |
|--------------------------|

Debtor(s):

Corinne Lara Ramirez

Represented By
Natalie A Alvarado

Defendant(s):

Corinne Lara Ramirez

Represented By
Scott Talkov

Plaintiff(s):

David Eggleston

Represented By
Tyler H Brown

Karin Doerr

Represented By
Tyler H Brown

Richard Alvarado

Represented By
Tyler H Brown

Yan Sum Alvarado

Represented By
Tyler H Brown

Trustee(s):

Steven M Speier (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
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Hearing Room 303

2:00 PM

6:20-17828 Christopher Edward Hutchinson

Chapter 7

Adv#: 6:21-01015 Cotter et al v. Hutchinson et al

#17.00 CONT. Status Conference RE: [1] Adversary case 6:21-ap-01015. Complaint by Matthew Cotter, Courtney Cotter against Christopher Edward Hutchinson, false pretenses, false representation, actual fraud)) (Pagter)

*Alias summons issued on 3/3/21 for defendant Veronica Hutchinson

Also #18

From: 3/31/21

EH__

(Tele. appr. Baruch Cohen, rep. Defendants, Christopher and Veronica Hutchinson)

(Tele. appr. Misty Perry Isaacson, rep. Plaintiffs)

Docket 1

Tentative Ruling:

- NONE LISTED -

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| Party Information |
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Debtor(s):

Christopher Edward Hutchinson

Represented By
Paul Y Lee

Defendant(s):

Christopher Edward Hutchinson

Represented By
Baruch C Cohen

**United States Bankruptcy Court
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2:00 PM

CONT... Christopher Edward Hutchinson

Chapter 7

Veronica Aurora Hutchinson

Pro Se

Joint Debtor(s):

Veronica Aurora Hutchinson

Represented By
Paul Y Lee

Plaintiff(s):

Courtney Cotter

Represented By
R Gibson Pagter Jr.

Matthew Cotter

Represented By
R Gibson Pagter Jr.

Trustee(s):

Larry D Simons (TR)

Pro Se

**United States Bankruptcy Court
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6:20-17828 Christopher Edward Hutchinson

Chapter 7

Adv#: 6:21-01015 Cotter et al v. Hutchinson et al

#18.00 Defendants' Motion to Dismiss First Amended Complaint

Also #17

EH__

(Tele. appr. Baruch Cohen, rep. Defendants, Christopher and Veronica Hutchinson)

Docket 16

Tentative Ruling:

5/5/2021

Service proper
Opposition filed

BACKGROUND

On December 8, 2020, Christopher and Veronica Hutchinson ("Debtors") filed a Chapter 7 voluntary petition for bankruptcy. On Schedule E/F, Debtors listed a business debt in the amount of \$725,000 to Matthew and Courtney Cotter. Debtors received a discharge on March 15, 2021.

On January 27, 2021, Matthew and Courtney Cotter ("Plaintiffs") commenced adversary proceeding No. 6:21-ap-01015 by filing a complaint for non-dischargeability. Debtors filed their first motion to dismiss on February 25, 2021. On March 2, 2021, Plaintiffs filed a first amended complaint [Dkt. 8] to determinate dischargeability of debt and for declaratory relief re community property liability pursuant to 11 U.S.C. §§ 523(a)(2)(A), (a)(4), and (a)(6) ("FAC") mootng Debtors' motion.

On March 22, 2021, Debtors filed the instant motion to dismiss for failure to state a

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claim pursuant to FED. R. CIV. P. Rule 12(b)(6) and FED. R. CIV. P. Rule 9(b) ("Rule 9(b)"). [Dkt. 16]. On April 21, 2021, Plaintiffs filed an opposition. [Dkt. 21].

DISCUSSION

I. MOTION TO DISMISS STANDARD

FED. R. CIV. P. Rule 12(b)(6), made applicable in adversary proceedings through FED. R. BANKR. P. Rule 7012, a bankruptcy court may dismiss a complaint if it fails to "state a claim upon which relief can be granted." In reviewing a FED. R. CIV. P. Rule 12(b)(6) motion, the trial court must accept as true all facts alleged in the complaint and draw all reasonable inferences in favor of the plaintiff. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). The trial court need not, however, accept as true conclusory allegations in a complaint or legal characterizations cast in the form of factual allegations. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007); *Hartman v. Gilead Scis., Inc. (In re Gilead Scis. Sec. Litig.)*, 536 F.3d 1049, 1055 (9th Cir. 2008).

To avoid dismissal under FED. R. CIV. P. Rule 12(b)(6), a plaintiff must aver in the complaint "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). It is axiomatic that a claim cannot be plausible when it has no legal basis. A dismissal under FED. R. CIV. P. Rule 12(b)(6) may be based either on the lack of a cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1121 (9th Cir.2008).

II. NON-DISCHARGEABILITY STANDARD

Plaintiff's FAC proceeds under a theory of non-dischargeability pursuant to 11 U.S.C. §§ 523(a)(2)(A) for fraud, (a)(4) for embezzlement, (a)(6) for willful and malicious injury. Specifically, these sections provide:

- (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –
 - (2) for money, property, services, or an extension, renewal, or refinancing of creditor, to the extent obtained by –
 - (A) false pretenses, a false representation, or actual fraud, other than

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a statement respecting the debtor's or an insider's financial condition;

...

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

...

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

11 U.S.C. §§ 523(a)(2)(A), (a)(4), (a)(6).

With respect to the first claim, the elements of a § 523(a)(2)(A) claim are well-established: (1) the debtor made representations; (2) which were known to be false; (3) the representations were made with the intention and purpose of deceiving the creditor; (4) the creditor relied on such representations; (5) the creditor sustained loss and damage as a proximate result of the representations. *See, e.g., In re Sabban*, 600 F.3d 1219, 1222 (9th Cir. 2010).

To succeed on the second claim for embezzlement, creditor must prove: "(1) the property was rightfully in the possession of a non-owner; (2) the non-owner appropriated the property to a use other than which it was entrusted; and (3) circumstances indicating fraud." *In re Laos*, 513 B.R. 119, 125 (Bankr. D. Ariz. 2014). A creditor becomes the owner of funds when transferred pursuant to a contract. *See In re Wada*, 210 B.R. 572, 576 (B.A.P. 9th Cir. 1997) *accord In re Mercer*, 169 B.R. 694, 697 (Bankr. W.D. Wash. 1994) ([u]nder federal bankruptcy law, absent agreement to the contrary, a contractor receiving progress payments takes the funds as owner); *see also In re Schultz*, 46 B.R. 880, 889 (Bankr. D. Nev. 1985) (Where building contract provides for certain services at certain prices, and there is a transfer of money within the contract price, ownership as well as possession passes, and all that remains is a contractual obligation.).

Last, as to the third claim, creditor must prove that the injury was both willful and malicious. *See In re Barboza*, 545 F.3d 702, 706 (9th Cir. 2008). "A "willful" injury is a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury. *Id.* A "malicious" injury involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." *Id.*

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III. *RULE 9(B) STANDARD*

As Debtors correctly point out, Rule 9(b) is applicable to a § 523(a)(2)(A) non-dischargeability proceeding. *See, e.g., In re Kimmel*, 2008 WL 5076380 at *1 (9th Cir. 2008). Additionally, where plaintiff alleges a "unified course of fraudulent conduct" and relies entirely on that conduct as the basis of a claim, "the claim is said to be grounded in fraud or to sound in fraud, and the pleading of that claim as a whole must satisfy the particularity requirement of Rule 9(b)." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103–04 (9th Cir. 2003) (internal quotations omitted). By contrast, where "fraud is not an essential element of a claim, only allegations ("averments") of fraudulent conduct must satisfy the heightened pleading requirements of Rule 9(b)." *Id.* at 1105.

Rule 9(b) states: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." "In order to properly plead fraud with particularity, the complaint must allege the time, and content of the fraudulent representation such that a defendant can prepare an adequate response to the allegations." *In re Kimmel*, 2008 WL 5076380 at *1. The heightened pleading standard is commonly cited as requiring the allegations to identify "the who, what, when, where, and how of the misconduct charged." *See, e.g. U.S. v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1167 (9th Cir. 2016); *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010).

IV. *ANALYSIS*

As an initial matter, the causes of action in the FAC need to indicate which Defendant each cause is against. With respect to the first claim for fraud, the FAC boils down to two sets of misrepresentations. The first set is grounded in what Christopher was purportedly supposed to do pursuant to a construction contract entered into on September 12, 2018. *See* FAC ¶ 9, 10, 17 (providing for completion date, type of work, and timely service according to code). However, at some point when Christopher received funds to perform such work under the contract, he instead allegedly kept those funds and did not follow through under the terms of the contract. *See* FAC ¶ 18 ("These material Representations were false in that Christopher kept the

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funds and did not use them for their intended purpose under the Contract."); FAC ¶ 22 ("Christopher abandoned the unfinished project. . . .").

Essentially, if the Court extrapolates, Plaintiff is attempting to plead that Christopher must have lied to Plaintiffs when entering the contract and accepted payments because in hindsight work was not completed. Although Debtors correctly point out that these are misrepresentations of a promise to do work and are not typically actionable, there is a subset of § 523(a)(2)(A) authority in the Ninth Circuit that validates nondischargeability actions for promissory fraud. *See, e.g., Tobin v. Sans Souci Ltd. P'ship (In re Tobin)*, 258 B.R. 199, 203 (9th Cir. BAP 2001); *In re Carlson*, 426 B.R. 840, 854 (Bankr. D. Idaho 2010) ("These cases require proof that at the time the promise was made, it was then known to the maker to be false and that there was no intent or ability to perform the promise.").

Notwithstanding, the Court is inclined to agree with Debtors' general argument that the FAC does not provide facts to support Plaintiff's conclusion to the extent required by Rule 9(b). The key element of falsity amounts to the conclusory statement that Christopher did not use the funds for the intended purposes. While arguably plausible, under a Rule 9(b) analysis, the circumstances of the fraud must have sufficient detail, i.e., "the who, what, when, where, and how of the misconduct charged." *See United Healthcare Ins. Co.*, 848 F.3d at 1167. Plaintiffs' arguments in its opposition are illustrative of the problem with the FAC:

Christopher failed to provide the above noted materials and fixtures to the Plaintiffs nor did he return the deposits for the same. As such, it is disingenuous of the Defendants to argue that Plaintiffs have failed to show that Plaintiffs never received the materials and fixtures and Christopher did not return the funds.

[Dkt. 21, pg. 4].

The reason for the Debtors' argument is apparent in Plaintiffs' above response—these facts, which may have supported falsity, are not included in the FAC. And this is just one example of the lack of circumstances surrounding the fraud. For example, when was the \$98,218 furnished? When and how did Christopher request each amount and make each representation? Under what contract terms or invoices? Before or after some work was completed? At what point after receiving the funds did Christopher

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cease working? Facts purportedly clarifying some of these details appear in Plaintiffs' opposition, where the Plaintiffs argue that a total of \$62,103 was tendered due to invoices falsely misrepresenting the completion of certain steps in the construction process. *See* [Dkt. 21, pg. nos. 2-3]. Although Plaintiff is correct that Rule 9b does not require a plaintiff to make detailed evidentiary allegations or forecast the evidence that the plaintiff hopes to adduce in discovery or at trial, on the first set of representations alone, the Court cannot find that there is enough specificity for Debtors to "prepare an adequate response to the allegations" to satisfy Rule 9b. *See In re Kimmel*, 2008 WL 5076380 at *1.

With respect to the second set of misrepresentations that Christopher failed to disclose that his contractor's license had been revoked [FAC ¶ 13-16], the Court notes an inconsistency between the FAC and Plaintiffs' opposition. The FAC ¶ 13 states that the license was suspended on November 25, 2018, reinstated, and then revoked on January 10, 2019, however, the opposition states it was suspended on two prior occasions on November 21, 2015 and again on June 19, 2017. [Dkt. 21, pg. 6]. The acknowledgement in the opposition that the disclosure has to be made before the contract date, and the new suspension dates, further illustrate the problem with the FAC.

In addition, FAC ¶ 17 appears incorrect because it defines "Representations" as those in ¶¶ 9, 10, 13, 14. But ¶ 14 is not a representation while ¶ 17 appears to be to be a representation. This apparent error leads to more confusion. For example, ¶ 18 says the Representations are false because Christopher kept the funds, however; this only alleges falsity for some of the Representations, not all. In this view, the Court also notes there is no allegation as to how the Representations in ¶¶ 9, 10 were false.

As to claims two and three for embezzlement and willful and malicious injury, the Court finds neither are sufficient to state a claim. On the embezzlement claim, the FAC includes no allegations that Christopher was a "non-owner" of the funds, rather he received the funds pursuant to a contract, and thus there is no "cognizable legal theory." *See In re Laos*, 513 B.R. 119, 125 (Bankr. D. Ariz. 2014) (elements of embezzlement); *In re Schultz*, 46 B.R. 880, 889 (Bankr. D. Nev. 1985) (ownership passes on transfer of money pursuant to a contract); *Johnson*, 534 F.3d at 1121 (standard for dismissing under Rule 12(b)(6)). With respect to the willful and malicious cause of action, as with the § 523(a)(2)(A) claim, such facts would need to

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be pled with particularity as the claim is grounded in Christopher's fraud. *See Vess*, 317 F.3d at 1103–04.

Finally, as to the fourth claim for declaratory relief, Plaintiffs are correct that Debtors have misconstrued the determination sought. 11 U.S.C § 524(a)(3) states that a discharge:

operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, *except a community claim that is excepted from discharge under section 523, 1192, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.*

As such, there is a cognizable legal theory to support a declaratory judgment that should the debt be a community claim and excepted from discharge, Plaintiffs could pursue community property in satisfaction of its judgment.

FED. R. CIV. P. Rule 15(a)(2), incorporated into bankruptcy proceedings by FED. R. BANKR. P. Rule 7015, provides that "a party may amend its pleading only with opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." *See also Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) ("Although Rule 15(a) gives the trial court discretion over this matter, we have repeatedly stressed that the court must remain guided by the underlying purpose of Rule 15 . . . to facilitate decision on the merits, rather than on the pleadings or technicalities.") (internal quotation omitted). Given the liberal standard, at this time, the Court will grant leave to amend the claims.

TENTATIVE RULING

For the foregoing reasons, the Court is inclined to:

- GRANT the motion to dismiss the first, second, and third claims, with leave to

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amend;
- DENY the motion to dismiss the fourth claim.

APPEARANCES REQUIRED.

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| Party Information |
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Debtor(s):

Christopher Edward Hutchinson

Represented By
Paul Y Lee

Defendant(s):

Veronica Aurora Hutchinson

Represented By
Baruch C Cohen

Christopher Edward Hutchinson

Represented By
Baruch C Cohen

Joint Debtor(s):

Veronica Aurora Hutchinson

Represented By
Paul Y Lee

Plaintiff(s):

Courtney Cotter

Represented By
R Gibson Pagter Jr.
Misty A Perry Isaacson

Matthew Cotter

Represented By
R Gibson Pagter Jr.
Misty A Perry Isaacson

Trustee(s):

Larry D Simons (TR)

Pro Se